

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Michael Hayslip,	:	
Plaintiff,	:	
v.	:	Case No. 3:01-cv-433
Commissioner of Social Security,	:	JUDGE ROSE
Defendant.	:	

REPORT AND RECOMMENDATION

On March 18, 2003, the Court reversed the decision of the Commissioner of Social Security which had denied the plaintiff's application for benefits, and remanded the case for an award of benefits. Subsequently, plaintiff's counsel filed a motion for the award of attorneys' fees under 42 U.S.C. §406. Counsel requested an award of \$35,151.25, which apparently represents 25% of the past due benefits. The Commissioner opposed the motion, arguing that the amount of fees awarded must be limited to \$5,300. No reply brief has been filed. For the following reasons, the Court concludes that, on the basis of the current record, it cannot award fees in excess of \$5,300. Consequently, it will recommend that the motion for fees be granted but only to the extent that counsel be awarded \$5,300.00 as fees.

Counsel submitted a one-page fee petition accompanied by a multi-page "fee application affidavit." This latter document is not really an affidavit because it has not been signed by anyone, and consequently lacks a signature under oath or under penalty of perjury. Taking it at face value, however, the "affidavit" sets forth the following facts. First, plaintiff's counsel has over thirty years of experience in social security matters. Second, a

total of 36.50 hours of time was charged to this case, of which 16.75 hours is attorney time and 19.75 hours is secretarial time. Third, plaintiff signed a fee agreement on March 15, 1995, and appointed counsel as his representative on his Title II claim on October 27, 2000. Nothing else is included in the petition, such as the usual hourly rate charged by counsel, the actual award of benefits to plaintiff showing the amount withheld for fees, or any information that would allow the Court to determine the amount of benefits which had accrued to a date three months after the case became ripe for decision. See Dearing v. Secretary of HHS, 815 F.2d 1082 (6th Cir. 1987).

The Commissioner's opposition to a fee award in excess of \$5,300.00 is based upon the fee agreement attached to the petition. That agreement appears to relate solely to services rendered by counsel in connection with proceedings before the Commissioner (and not to any subsequent court proceedings). It states that counsel had agreed to charge a fee which would be the smaller of 25% of benefits awarded or \$4,000, but that the \$4,000 maximum fee could be increased from time to time by action of the Social Security Administration. In 2002, the Administration increased the fee which could be collected under 42 U.S.C. §406(a)(2)(A) to \$5,300. Thus, according to the Commissioner, counsel cannot be awarded more than that amount. Counsel has not responded to this argument.

The fee petition filed in this case has multiple deficiencies. As noted, it is not accompanied by a proper affidavit, and there is no information presented on a number of matters of importance to the Court, including whether plaintiff and counsel entered into a separate fee agreement in connection with litigation in District Court or what the terms of any such agreement might have been. The Court also notes that if counsel were awarded \$35,151.25 in fees for 16.75 hours of work, the

hourly rate of that award would be over \$2,000.00 per hour. An amount equal to twice the usual hourly rate of counsel is presumed reasonable, see Damron v. Commissioner of Social Security, 104 F.3d 853, 856 (6th Cir. 1997), but a fee of more than \$2,000.00 per hour may well be excessive and unreasonable. Nevertheless, the Court need not decide that question.

Here, the only fee agreement proffered by counsel is the one attached to the petition. It clearly caps the fee at \$5,300.00. Although the Court may award fees in excess of the caps permissible at the administrative level because such fees are awarded under 42 U.S.C. §406(b) rather than §406(a), it cannot do so in the absence of any evidence that counsel and the plaintiff entered into a separate fee agreement covering litigation before the District Court. There is no such evidence in this record. Consequently, basing its decision solely on the record, the Court must award no more than \$5,300.00.

Based on the foregoing, it is recommended that the motion for attorneys' fees submitted by plaintiff's counsel (#25) be granted in part and that counsel be awarded the sum of \$5,300.00 to be paid out of the past due benefits.

#### PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within ten (10) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with

instructions. 28 U.S.C. Section 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir.1981).

/s/ Terence P. Kemp  
United States Magistrate Judge